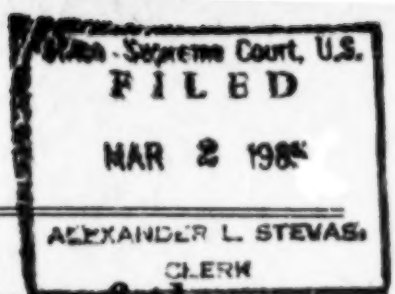


(5)
No. 84-589



**In the Supreme Court of the
United States**

October Term, 1984

PAUL EDMOND DOWLING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED**I.**

WHETHER THE DISTRICT COURT AND THE COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED IN CONCLUDING THAT THE INTERSTATE TRANSPORTATION OF RECORD ALBUMS CONTAINING COMPOSITIONS RECORDED WITHOUT THE CONSENT OF THE COPYRIGHT OWNERS CONSTITUTES THE TRANSPORTATION OF "STOLEN GOODS" WITHIN THE MEANING OF THE NATIONAL STOLEN PROPERTY ACT, 18 U.S.C. §2314?

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OPINION BELOW

The opinion of the Court of Appeals (Pet. Supp. App. A1-A12) is reported at 739 F.2d 1445.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 10, 1984. The petition for a writ of certiorari for the United States Court of Appeals for the Ninth Circuit was filed on October 9, 1984. This Court granted the Petition on January 14, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 1, Section 8, of the United States Constitution provides, in pertinent part:

The Congress shall have the power . . . to Promote the Progress of Science and the useful Arts by securing for limited Time to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

The National Stolen Property Act (NSPA), 18 U.S.C. §2314 (1982), provides, in pertinent part, as follows:

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud;

* * *

Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

* * *

Section 101 of the Copyright Act, 17 U.S.C. §101 (1976) and (1982), provides in pertinent part as follows:

"Copyright owners", with respect to any of one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

Section 102(a) of the Copyright Act, 17 U.S.C. §102(a) (1976), provides:

Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression. . . .

* * *

Section 106 of the Copyright Act, 17 U.S.C. §106 (1976) and (1982), provides as follows:

Subject to sections 107 through 118, the owner of copyright under this Title has the exclusive rights to do and to authorize any of the following:

- (1) To reproduce the copyrighted work in copies or phonorecords;
- (2) To prepare derivative works based upon the copyrighted work;
- (3) To distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership or by rental, lease, or lending;
- (4) In the case of literary, musical, dramatic, and choreographic work, pantomimes, and motion pictures and other audio-visual works, to perform the copyrighted work publically; and
- (5) In the case of literary, musical, dramatic, and choreographic work, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of the motion picture or other audio-visual work, to display the copyrighted work publically.

* * *

Section 202 of the Copyright Act, 17 U.S.C. §202 (1976) and (1982), states as follows:

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copy-

right or of any exclusive rights under a copyright convey property rights in any material object.

Section 506 of the Copyright Act, 17 U.S.C. §501, entitled "Criminal Offenses" provides as follows:

(a) Criminal Infringement.

Any person who infringes a copyright willfully and for purposes of commercial advantage or private gain shall be fined not more than \$10,000 or imprisoned for not more than one year, or both. . .

(b) Forfeiture and Destruction.

When any person is convicted of any violation of subsection (a), the court, in its judgment of conviction, shall, in addition to the penalty described therein, order the forfeiture and destruction or other disposition of all infringing copies or phonorecords and all implements, devices or equipment used in manufacturing such infringing copies or phonorecords.

Section 506(a) as amended by Pub.L. 97-180, 17 U.S.C. §506(a) (1982) provides:

Any person who infringes a copyright willfully and for purposes of commercial advantage or private gain shall be punished as provided in section 2319 of Title 18.

The Piracy and Counterfeiting Amendment Act of 1982, 18 U.S.C. §2319, is set forth, in pertinent part, in the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, at pages 3-4.

STATEMENT OF THE CASE

A. Course of Proceedings

Following a stipulated facts trial in the United States District Court for the Central District of California, Petitioner was convicted of all 27 counts in the second superseding indictment, which alleged conspiracy to transport stolen property in violation of 18 U.S.C. §371 (Count One), interstate transportation of stolen property in violation of 18 U.S.C. §2314 (Counts Two through Nine), copyright infringement in violation of 17 U.S.C. §506(a) (Counts Ten through Twenty-Four), and mail fraud in violation of 18 U.S.C. §1341 (Counts Twenty-Five through Twenty-Seven). (*See, e.g.,* Jt. App. at A2-A13.)

On appeal, Petitioner did not contest his conviction on the misdemeanor copyright infringement counts. Rather, Petitioner contested his felony convictions and maintained, as he did before the District Court, that the sale of the materials in no way constitutes interstate transportation of stolen property or mail fraud within the meaning of 18 U.S.C. §§2314 and 1341. Inasmuch as this Court granted certiorari to review the propriety of only the interstate transportation of stolen property convictions, the mail fraud convictions are not at issue.

B. Summary of the Stipulated Facts

Petitioner has been a collector of Elvis Presley recordings for over ten years, having massed a record collection of over 2,000 titles (R.T. 87). He has obtained these recordings generally by purchase from, or trade with, other collectors located around the world (R.T. 89).

In 1976, Mr. Dowling became involved in the sale of Elvis Presley sound recordings as a business (R.T. 90). Mr. Dowling did so without the consent of copyright proprietors of the musical compositions which Elvis

Presley sang. At the stipulated facts trial, Mr. Dowling directly admitted that he manufactured and distributed albums (on certain label names not connected with any of the major record companies) containing the outtakes of Elvis Presley performances,¹ and he paid no royalties to holders of the composition copyrights (R.T. 90-112). Mr. Dowling made seven unauthorized albums: one from a concert tape, one from the sound tracks of two Presley motion pictures, and the others from studio outtakes and tapes of Presley television appearances.

Mr. Dowling utilized the services of Sund Services, an addressing and mailing service located in Glendale, California, which mailed over 50,000 catalogues and fliers advertising the phonorecords. (Jt. App. A14-15) Mr. Dowling's co-defendant collected the orders and then sent them to Mr. Dowling who mailed the requested albums from Maryland.

C. Summary of the Ninth Circuit's Decision

The Court of Appeals affirmed Petitioner's convictions (Pet. Supp. App. A1-A12 739 F.2d at 1450). Relying on *United States v. Belmont*, 715 F.2d 459 (9th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 1275 (1984) the Court of Appeals rejected Petitioner's argument that acts of copyright infringement could not be properly prosecuted under the National Stolen Property Act, (NSPA) 18 U.S.C. §2314. Petitioner argued that a copyright is not a "good, ware or merchandise" and that copyright infringement is not equivalent to conversion, stealing, or taking by fraud, within the meaning of the NSPA. The Court of Appeals concluded that, under the law of the *Belmont* case, a copyright is a "good, ware, [or] merchandise"

¹"Outtakes" are portions of tapes not used in the original edited broadcast. (Pet. Supp. App. A2 n.1)

within the meaning of the NSPA. The Court never reached the question of whether copyright infringement comes within the meaning of the terms "stolen, conversion, or taken by fraud." 18 U.S.C. §2314 (Pet. Supp. App. A10-11).

The Court of Appeals also declined to reconsider the *Belmont* holding in light of the Supreme Court's holding in *Sony Corp. of America v. Universal City Studios, Inc.*, ____ U.S. ____, 104 S.Ct. 774 (1983). *Sony* reaffirms the principle that the remedies for copyright infringement cannot be expanded by the judiciary absent clear legislative guidance. The Court reasoned that Petitioner had advanced no evidence that Congress intended to provide section 506 of the Copyright Act as the exclusive prosecutorial route within which to punish copyright infringement. (Pet. Supp. App. A-6).

SUMMARY OF THE ARGUMENT

1. Petitioner contends that the Court of Appeals' construction of the NSPA impermissibly expands the remedies for copyright infringement. Article 1, Section 8 of the Constitution mandates that only Congress shall have the power to remedy acts of copyright infringement. *Sony Corporation v. Universal Studios, Inc.*, ____ U.S. ____, 104 S.Ct. 774 (1983).

The issue in the instant case is whether Congress intended that acts of copyright infringement should be remedied by the National Stolen Property Act, 18 U.S.C. §2314. The Fifth and Ninth Circuit Courts of Appeals reached different conclusions as to whether section 2314's terms proscribed acts of copyright infringement. *Compare United States v. Dowling*, 715 F.2d 1445 (9th Cir. 1984) and *United States v. Belmont*, 715 F.2d 459 (9th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 1275 (1984) (meaning of National Stolen Property Act should be expanded to include copyrights and acts of copyright infringement), *with United States v. Smith*, 686 F.2d 234

(5th Cir. 1982) (the terms "goods, wares and merchandise", do not encompass intangible, incorporeal rights such as copyright, and terms "stolen, conversion, and taken by fraud" do not include acts of copyright infringement).

The Court of Appeals' reliance on *Belmont* to hold that Petitioner's acts of copyright infringement violated the National Stolen Property Act, 739 F.2d at 1450-51, was unsound in view of the principles set forth in *Sony Corporation of America v. Universal City Studios, Inc.*, ___ U.S. ___, 104 S.Ct. 774 (1983). The *Belmont* Court concluded that the unauthorized sale of videotape cassettes of copyrighted motion pictures, came within the meaning of the National Stolen Property Act, 18 U.S.C. § 2314, because, in its view, the law against transporting property needed to be expanded to include new kinds of property that thieves had devised new ways of appropriating. 715 F.2d at 461-62 (footnote omitted).

This reasoning of the *Belmont* Court, which the Court of Appeals relied upon (Pet. Supp. App. A10), demonstrates that the Ninth Circuit engaged in judicial legislating. The notion that the judiciary can expand the scope of a criminal statute to accommodate new forms of property and new forms of theft, especially in the context of the Constitution's direction that Congress has the power to remedy copyright infringement, is inconsistent with traditional principles of separation of power. *Sony Corporation of America v. Universal City Studios, Inc.*, ___ U.S. ___, 104 S.Ct. 774, 783 (1983). "The protection given to copyright is wholly statutory (citation)" and "[t]he remedies for infringement 'are only those prescribed by Congress.'" Quoting *Thompson v. Hubbard*, 131 U.S. 123 (1889) (emphasis added).

2. The Court of Appeals' view that Petitioner was required to demonstrate that Congress intended Section

506 to be an exclusive remedy for copyright infringement (see 739 F.2d at 1448) begs the question of whether Congress intended the National Stolen Property Act to encompass copyright infringement. This approach to statutory analysis is improper.

To determine whether Congress intended to remedy copyright infringement by enacting the NSPA, the terms of the NSPA must first be examined to assess their common sense or usual meaning. *Williams v. United States*, 458 U.S. 279, 285-87 (1982). If the conduct in question is not within the common sense or usual meaning of the statute's terms, but possibly may include the challenged conduct, the legislative history of the Act must be examined to determine Congress' intent to proscribe the conduct in question. See *id.* at 290. The rationale underlying this analysis is that criminal statutes must be strictly construed.

Application of this analysis, in light of the principle that the judiciary cannot expand the remedies for copyright infringements absent explicit legislative guidance, *Sony*, ___ U.S. at ___, 104 S.Ct. at 783, compels the conclusion that the Court of Appeals' decision must be reversed.

3. The usual and common sense meaning of the terms "goods, wares, [and] merchandise", in the National Stolen Property Act, does not include copyright. A copyright is an incorporeal, intangible right or privilege that is distinct from the physical or tangible object in which it is embodied. 17 U.S.C. § § 102(a), 202 (1976) and (1982). Goods, wares, and merchandise, on the other hand, connote a tangible object. U.C.C. § 2-105; *United States v. Smith*, 686 F.2d at 240. Accordingly, the terms goods, wares and merchandise, if given their usual or common sense meaning, do not include a copyright.

4. Similarly, the section 2314's terms "stolen, converted, or taken by fraud", do not encompass acts of copyright infringement. The usual or common sense meaning of these terms calls to mind a taking of something tangible. See *United States v. Turley*, 352 U.S. 407 (1957) (the term "stolen" in the National Motor Vehicle Transportation Act, 18 U.S.C. §2313, which prohibits transporting stolen motor vehicles across interstate lines, encompasses all felonious takings with intent to deprive the owner of the benefit and use of property accomplished by embezzlement, false pretenses and conversion); *United States v. Long Cove Seafood, Inc.*, 582 F.2d 159 (2nd Cir. 1978) (National Stolen Property Act was designed to extend the provisions of the National Stolen Vehicle Transportation Act, therefore, the term "stolen" should be similarly construed).

The usual and common sense meaning of copyright infringement is that it is a *trespass* into, or interference with, the copyright holder's exclusive rights statutorily granted by section 106 of the Copyright Act, 17 U.S.C. §106(1)-(5). *Sony*, ____ U.S. at ____, 104 S.Ct. at 784. Thus, acts of copyright infringement are conceptually different from acts constituting felonious takings because the infringing activity does not *deprive* the owner of its rights, but, rather, interferes with those rights. Consequently, copyright infringement is not the equivalent of conversion. *Local Trademarks, Inc. v. Price*, 170 F.2d 715, 718 (5th Cir. 1948). Thus, acts of copyright infringement do not come within the meaning of the terms "stolen, converted, or taken by fraud." Cf. *United States v. Carman*, 577 F.2d 556 (9th Cir. 1978) (fraudulent scheme which reduces another's wealth by placing money out of reach of creditors is not stealing, taking by fraud, or conversion within the meaning of §2314).

5. Nothing in the legislative history of the National Stolen Property Act suggests that Congress intended to proscribe acts of copyright infringement. The legislative history contains no reference to copyright or copyright infringement activity.

The *Belmont* Court viewed the Piracy and Counterfeit Amendments Act of 1982, Pub. L. No. 97-180, (codified as amended at 18 U.S.C. §2319 (1982)), as evidence that Congress intended to permit prosecutions under the National Stolen Property Act. The Court of Appeals reasoned that because the Amendments provide that "such penalties shall be in addition to any other provisions of Title 17 or any other law," 18 U.S.C. §2319, and the National Stolen Property Act is "other law", Congress intended to expand the remedies for copyright infringement. (Pet. Supp. App. A5-6) Petitioner contends that because these amendments were enacted *subsequent* to Petitioner's acts of copyright infringement, Congress' decision to expand the remedies for copyright infringement by enacting the 1982 Amendments has no bearing on Petitioner's earlier in time conduct. *United States v. Bass*, 404 U.S. 336, 348 (1971); Cf. *Center for Auto Safety v. EPA*, 731 F.2d 16, 22 (D.C. Cir. 1984) (courts may not apply laws not yet written).

Moreover, the fact that Congress deemed it necessary to specifically provide felony punishment by enacting the 1982 Amendments is strong evidence that the felony provisions of other laws, such as the NSPA, were not thought, or intended, to be applicable to copyright infringement activity. The legislative history surrounding the Piracy and Counterfeiting Amendments Act of 1982 evinces Congress' belief that felony provisions of other statutes had no application to acts of copyright infringement at the time when Petitioner engaged in such conduct. Senate Bill 691 was amended to provide that its penalties were in addition to other law because the Bill, as

introduced, was unclear as to whether the penalties in the Bill were to supplement existing remedies or whether they were intended to be exclusive. S. Rep. No. 97-274, 97th Cong. 1st Sess. 1, 2 (1981), reprinted in 4 *U.S. Code Cong. & Ad. News* 127, 128 (1982). Thus, the Senate amended Senate Bill 691 to provide that the penalties of section 2319 would be in addition to any other provisions of Title 17 or any other law, "[to] clarif[y], for example, that the remedies contained in 17 U.S.C. §506(b) (relating to forfeiture and destruction) and those contained in 17 U.S.C. 509 (relating to seizure and forfeiture), would continue to apply to criminal infringements of a copyright." *Id.*

The legislative history of the 1982 amendments also reveals that both Congress and the Department of Justice believed that penalties for copyright piracy and counterfeiting were among the most lenient, "[a]s compared to other theft and forgery statutes . . ." *Id.* at 6, 4 *U.S. Code Cong. & Ad. News* at 132. It was precisely because the Senate Committee concurred with the view that the then existing penalties for film and record piracy and counterfeiting were too lenient that it concluded that Senate Bill 691, as amended, should be passed. *Id.* at 6-7, 4 *U.S. Code Cong. & Ad. News* at 132-33. Thus, the only inference to be drawn from enactment of the "in addition to other law" amendment, is that other law did not apply to acts of copyright infringement occurring before enactment of the 1982 amendments.

In sum, the legislature history of the 1982 amendments makes clear Congress' view that, at the time Petitioner committed the acts of copyright infringement, substantial felony penalties were unavailable. Consequently, these amendments do not support the Court of Appeals' decision in *Belmont*, or the decision in Petitioner's case. Since nothing in the legislative history of the National Stolen

Property Act provides clear legislative guidance that Congress intended to remedy copyright infringement, the Court of Appeals' decision must be reversed.

6. Petitioner also contends that other sound principles of statutory construction necessitate a reversal of the Ninth Circuit decision. The law is settled that where a general statute might be construed to relate to the same subject as does a more specific statute, the specific statute should apply to the exclusion of the general. *United States v. Carman*, 577 F.2d 556, 565 (9th Cir. 1978). Thus, even if a broad reading of the NSPA makes it plausible that acts of copyrights infringement are proscribed, the specific remedies for such activity set forth in 17 U.S.C. §506 (1976) renders that statute the more appropriate vehicle for prosecution of copyright infringement.

Another applicable principle is that where a choice is to be made between two readings of what Congress conduct has made a crime, Congress must speak in language clear and definite before the harsher alternative may be chosen. *Williams v. United States*, 458 U.S. 279, 290 (1982). In the instant case, application of the NSPA to Petitioner's copyright infringement activity increases the criminal penalties beyond that provided by Congress in the Copyright Act at the time of Petitioner's infringing activity. Compare 17 U.S.C. §506 (1976) (providing for a \$10,000 fine or imprisonment for not more than one year, or both) with 17 U.S.C. §506 (1982) and 18 U.S.C. §2319 (1982) (enacting felony provisions) and 18 U.S.C. §2314 (1982) (\$10,000 fine or imprisonment for not more than ten years, or both).

Congress' decision to enact felony provisions "in addition to other law," e.g. 18 U.S.C. §2319, occurred subsequent to Petitioner's acts of criminal copyright infringement. Thus, the only remedy afforded by the Copyright Statute at the time in question was the mis-

demeanor penalties set forth in section 506. 17 U.S.C. §506 (1976). Application of the NSPA's felony provisions to Petitioner's conduct is clearly the harsher choice of statutes, and absent clear direction from Congress, is improper. Since nothing in the legislative history of the NSPA provides clear legislative guidance that Congress intended to remedy or to proscribe acts of copyright infringement, the Court of Appeals decision must be reversed.

ARGUMENT

I

THE DISTRICT COURT AND THE COURT OF APPEALS ERRED IN CONSTRUING THE NATIONAL STOLEN PROPERTY ACT, 18 U.S.C. §2314, TO PROSCRIBE ACTS OF COPYRIGHT INFRINGEMENT

A. Judicial Expansion of the National Stolen Property Act to Include a Remedy for Copyright Infringement Violates Article 1, Section 8, of the United States Constitution and Traditional Notions of Separation of Powers

Petitioner contends that the Court of Appeals construction of the NSPA impermissibly expanded the remedies for copyright infringement and encroached on Congress' lawmaking prerogative. Because the United States Constitution directs that only Congress has the power to remedy copyright infringement, the Court of Appeals decision violates traditional notions of separation of powers.

Article 1, Section 8 of the United States Constitution, provides as follows:

The Congress shall have Power . . . to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

In *Sony Corporation v. Universal City Studios*, ___ U.S. ___, 104 S.Ct. 774, 783 (1982), this Court explained that the Constitution empowers Congress to balance the competing interests of authors in the control and exploitation of their work and the interests of society in the free flow of information and ideas. "The direction of Art. 1 is that *Congress* shall have the power to promote the

progress of science and the useful arts . . . [thus,] the sign of how far Congress has chosen to go [in remedying copyright infringement] can only come from Congress." *Id.* 104 S.Ct. at 796, quoting, *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 530 (1972) (emphasis in original.) Since "the protection given to copyright is 'wholly statutory' (citation)", the "remedies for infringement 'are only those prescribed by Congress.'" *Id.* at ___, 104 S.Ct. at 783, quoting *Thompson v. Hubbard*, 131 U.S. 123, 151 (1889) (emphasis added). Thus, "the judiciary's reluctance to expand the protection afforded by the copyright laws without *explicit legislative guidance* is a recurrent theme." ___ U.S. ___ at ___, 104 S.Ct. 783 (citations omitted) (emphasis added).

Application of these principles in *Sony* led the Supreme Court to reject the view adopted by the Ninth Circuit that a federal copyright infringement claim could be premised upon the sale of a video-taped recording (VCR) to the general public for private home recording of broadcasted programs. In reaffirming the principle that only Congress has the power to remedy copyright infringement, the Supreme Court rejected the Ninth Circuit's suggestion of a judicially created remedy for copyright infringement. ___ U.S. ___, 104 S.Ct. at 796. See also *Teleprompter Corp. v. Columbia Broadcasting Systems, Inc.*, 415 U.S. 394, 430 (1974) (shifts in current business and commercial relationships as a result of the copyright legislation in 1909 and changes in technology, while of significance, cannot be resolved by litigation, but rather, detailed regulation of relationships and resolution of problems should be left to Congress); *Fortnightly Corp. v. United Artists*, 392 U.S. 390, 401 (1968) (Court rejected government's request for a compromise decision to accommodate various competing considerations of copyright, communication law, and anti-trust policy, stating that job is for Congress).

The Court of Appeals refused Petitioner's request to reconsider its holding in *United States v. Belmont*, 715 F.2d 459 (9th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1275 (1984), in light of these principles (Pet. Supp. App. A10-11). In so doing, the Court of Appeals also ignored the well settled principle that the legislature, not the courts, should define criminal activity. *United States v. Bass*, 404 U.S. 336, 347-48 (1971). Just as the Ninth Circuit created a judicial remedy for copyright infringement in *Sony*, the Ninth Circuit has expanded the remedies for copyright infringement by broadly interpreting the National Stolen Property Act to proscribe acts of copyright infringement. The following quote from *Belmont*, set forth by the Court of Appeals in its decision rejecting Petitioner's argument, demonstrates this fact:

The rights of copyright owners in their protected property are just as deserving of protection from interstate transportation as are the ownership interests of those who own other types of property. When society creates new kinds of property and thieves devise new ways of appropriating that property for their own use, the law against transporting property expands with the growth in the varieties of property. . . . A large percentage of the world supply of entertainment property is generated within this Circuit. If, indeed, the Fifth Circuit takes a different view of the matter, we are not bound to follow it.

United States v. Belmont, 715 F.2d 459, 461-62 (9th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1275 (1984) (footnote omitted) quoted in *United States v. Dowling*, 739 F.2d at 1450.

Petitioner contends that the Ninth Circuit's expansive interpretation of the National Stolen Property Act to include acts of copyright infringement violates traditional

notions of separation of powers and is tantamount to judicial legislating. *Cf. Center for Auto Safety v. EPA*, 731 F.2d 16, 22 (D.C. Cir. 1984) (not for court to apply laws not yet written). Only "Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests. . .," *Sony* ____ U.S. at ____ 104 S.Ct. at 783, and to remedy copyright infringement.

The following discussion demonstrates that there is no explicit legislative guidance for the Ninth Circuit's decision. The fact that the Fifth and the Ninth Circuits² reached different conclusions as to the scope of the National Stolen Property Act demonstrates the lack of clarity as to the issue. Under these circumstances, Congress should be required to speak in a much more clear fashion before the courts apply the NSPA to acts of copyright infringement.

B. Neither the Language Nor the Legislative History of the National Stolen Property Act Clearly Demonstrate That Congress Intended to Proscribe or to Remedy Copyright Infringement Activity by Enacting the National Stolen Property Act.

B(1). In Resolving Whether Congress Intended the NSPA To Proscribe Acts of Copyright Infringement, the Statute's Terms Must First Be Examined, In Light of Their Common Sense Meaning, To Determine If the Terms Are Often Applied To Characterize The Challenged Conduct; If a Broad Reading of the Statute Suggests That The Statute's Terms May Include The Conduct At Issue, The Legislative History Must Then Be Examined To Determine Whether Congress Clearly Intended Such A Result.

²The Eleventh Circuit also has concluded that prosecution for copyright infringement is proper under Section 2314. *United States v. Drum*, 733 F.2d 1503 (11th Cir. 1984); *United States v. Gottesman*, 724 F.2d 1517 (11th Cir. 1984).

The Court of Appeals rejected Petitioner's argument that the NSPA's terms and legislative history lacked the clear legislative guidance necessary to remedy copyright infringement activity. The Court reasoned that Petitioner had failed to demonstrate that Congress intended Section 506 to be an exclusive remedy for copyright infringement. Petitioner contends that this view begs the question of whether the NSPA encompasses copyright infringement. Moreover, this approach to statutory construction is not legally sound.

Williams v. United States, 458 U.S. 279 (1982), illustrates the appropriate method for analyzing the scope of the National Stolen Property Act. In *Williams*, the Supreme Court held that a check kiting scheme did not come within Section 1014's proscription against knowingly making a false statement or wilfully overvaluing land, property or security for the purpose of influencing the action of Federally insured banks.

In determining that the Petitioner's course of conduct was not the equivalent of making a false statement, the Court first examined the usual and common sense meaning of the terms of the statute. The Court then looked to the definition of the term check as set forth in the Uniform Commercial Code adopted by the state in which the activity occurred. 458 U.S. at 284-285. The Court concluded that under this definition, a check is not literally a false statement. 486 U.S. at 286. Accordingly, the Court rejected the government's argument that since drawers of checks are generally understood to represent that funds exist sufficient to cover the face value of their checks, they effectively make false statements if there are insufficient funds to cover the checks when they are presented.

Although this broad reading of the statute was plausible, the Court was not persuaded "that it [was] the preferable or intended one." 458 U.S. at 286. To find otherwise, the Court

reasoned, would slight the wording of the statute; whatever the general understanding of a check's function, the term false statement is not, in common usage, often applied to characterize bad checks. *Id.* The Court refused to base an expansive reading of the statute on inferences drawn "from subjective and variable 'understandings' . . ." because the Court was interpreting a criminal statute which did not explicitly reach the conduct in question. *Id.* at 286 & n.7. The Court concluded that if Congress intended to reach this conduct, "it did so with a peculiar choice of language and in an unusually backhanded manner." *Id.* at 287.

Because the statute did not clearly demonstrate Congress' intent to reach the challenged conduct, the Supreme Court next examined the legislative history surrounding the act. *Id.* at 288-90. The Court first noted that bad checks were not among the "false statements" or "overvalued property" originally addressed by the statute. *Id.* at 288. Because subsequent amendments did not suggest that the statute should be applicable to anything other than representations made with conventional loan or related transactions, the Court determined that the legislative history of the Act did not demand a broader reading of the statute. *Id.* In so concluding, the Court emphasized the rule of lenity: "When choice has to be made between two readings of what Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Id.* at 290, quoting *United States v. Bass*, 404 U.S. 336, 347 (1971). The Court determined that statutory language much more explicit than that used was required to hold that Congress intended to proscribe the challenged conduct. 458 U.S. at 290.

Application of this analysis to the instant case compels the conclusion that Congress did not intend, in enacting the National Stolen Property Act, to proscribe the acts of copyright infringement. First, when the terms in the National

Stolen Property Act are given their usual and common sense meaning, it is clear that they do not reach conduct constituting copyright infringement. Second, the Court of Appeals' reliance on amendments to the Copyright Act, which were enacted subsequent to Petitioner's acts of copyright infringement, simply cannot provide authority for the view that the 1934 NSPA was intended to proscribe Petitioner's conduct. Moreover, the legislative history surrounding the 1982 Amendments demonstrates Congress' belief that felony provisions in the theft laws were inapplicable.

B(2) The Terms of the National Stolen Property Act, When Examined in Light of Their Usual or Common Sense Meaning, Do Not Clearly Encompass Copyrights

The NSPA prohibits the interstate transportation of "goods, wares [and] merchandise," that are known to be "stolen, converted, or taken by fraud." 18 U.S.C. §2314. The Second Superseding Indictment charges Petitioner under the NSPA as follows:

"[Defendant] knowingly and willfully caused to be transported in interstate commerce phonorecords of a value of more than \$5,000, containing Elvis Presley performances of copyrighted musical compositions, which phonorecords, as the [defendant] then and there well knew, were stolen, converted and taken by fraud, *in that they were manufactured without the consent of the copyright proprietors.* (Jt. App. A6-7, A8).

B(2)(a) A Copyright Does Not Constitute Goods, Wares, or Merchandise Within the Meaning of the National Stolen Property Act

Petitioner submits that the terms "goods, wares [or] merchandise" are not often used to characterize a copyright.

The reason for the lack of interchangeability between the terms is that they are conceptually different forms of property.

The Supreme Court has defined a copyright as “[a] limited . . . statutory monopoly . . .” *Sony*, _____ U.S. ____, 104 S.Ct. at 783, quoting *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127. This monopoly privilege to use, reproduce and distribute the copyrighted work is neither unlimited, nor primarily designed “to provide a special private benefit.” *Id.* at ____, 104 S.Ct. at 782. Rather, it is “intended to motivate the creative activity of authors” so that the public will have access to the products of their creative genius after the limited period of exclusive control has expired. *Id.*

Black’s Law dictionary defines copyright in a similar manner:

“The right of literary property as recognized and sanctioned by positive law. An intangible, incorporeal right granted by statute to the author and originator of certain literary or artistic productions, whereby he is invested, for a limited period, with the sole and exclusive privilege of multiplying copies of the same and publishing and selling them.”

Black’s Law Dictionary, 304 (Rev. 5th Ed. 1979).

A copyright exists separate and apart from the physical object in which it is embodied. *See, e.g.*, 17 U.S.C. §§ 102(a) and 202. Section 201(a) of the Copyright Act provides that copyright protection “subsists . . . in original works of authors fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). Section 202 defines ownership of a copyright as distinct from ownership of any material object in which the work is embodied. 17 U.S.C. § 202.

Thus, copyrights in musical sound recordings are distinguishable from the underlying musical compositions which are transformed into aural form by the sound recording in the phonorecord, the material object on which the sound recording is recorded. M. Nimmer, *The Law of Copyright*, §2.10[A] (1982).

The principle that the copyright is distinct from its physical embodiment is reflected in various cases. *See, e.g., United States v. Smith*, 686 F.2d 234, 240 (5th Cir. 1982) (a copyright is independent of both its physical manifestation and the very thing that is copyrighted); *Local Trademarks, Inc. v. Price*, 170 F.2d 715, 718 (5th Cir. 1948) (copyright is an intangible incorporeal right in the nature of a franchise or a privilege and is independent of any material substance such as the manuscript or print therefrom); *cf. Werkmeister v. American Lithographic Company*, 142 F. 827, 830 (S.D.N.Y. 1905) (prior to publication, an author finished painting owns material piece of personal property consisting of the canvas and the paint upon it; he also owns an incorporeal right connected with it that is a right to make a copy of it); *see also Latern Press, Inc. v. American Publishers Company*, 419 F.Supp. 1267, 1271 (E.D.N.Y. 1976) (copyright is not identified with the copyrighted work; it exists separately from it as an intangible right to exclude all others from printing, publishing, copying, or vending the work); *King Brothers Productions, Inc. v. RKO Teleradio Pictures, Inc.*, 207 F.Supp. 271, 277 (S.D.N.Y. 1972) (same).

In sum, a copyright, together with the exclusive rights and privileges associated with the copyright, “does not implicate any tangible embodiment of the work.” *Smith*, 686 F.2d at 240 (footnote omitted). The copyright is distinct from the physical object in which it is embodied.

In marked contrast, the common or usual meaning of the phrase “goods, wares, and merchandise” encompasses

tangible, identifiable items, not intangible incorporeal property rights. Under the Uniform Commercial Code, adopted in California, goods are *not* general intangibles such as copyright. *Compare* U.C.C. § 2-105 (1978); Cal. Comm. Code § 2105 (West 1964) (goods means all things . . . which are movable at the time of identification to the contract for sale) *with* U.C.C. 9-106; Cal. Comm. Code § 9106 (West Supp. 1983) (general intangible includes any personal property, including things in action, "other than *goods*, accounts, chattel paper, documents, instruments, and money") (emphasis added). As the Fifth Circuit in *United States v. Smith* noted:

"Initially, a general dictionary definition reveals that a necessary element of goods, wares, and merchandise is that the item have a tangible existence. Black's Law Dictionary . . . has a specific listing for the phrase 'goods, wares, and merchandise.' The listing defines the phrase as '[a] general and comprehensive designation of such chattels and goods as are ordinarily subject of traffic and sale.' In turn, a 'chattel' is defined as '[a]n article of personal property, as opposed to real property. A thing personal and moveable. It may refer to animate as well as inanimate properties.' (Citation.) Black's defines the term 'goods' as including 'every species of personal property' or it may be given a very restricted meaning. [It includes] [i]tems of merchandise, supplies, raw materials, or finished goods. Sometimes the meaning of 'goods' is extended to include all tangible items as in the phrase 'goods and services.' (Citation)."

686 F.2d at 240.

The conceptual difference between the meaning of copyright ownership and the general definition of goods,

wares, or merchandise is striking. An incorporeal, intangible right or privilege, or grant to engage in or authorize certain activity, simply cannot be construed to be something tangible as is a good, ware, or merchandise.³ The common sense meaning of intangible property is that it is property other than *goods*. U.C.C. § 9-106; Cal. Comm. Code § 9106 (West Supp. 1983). Accordingly, section 2314's reference to "goods, wares and merchandise does not encompass intangible rights such as copyright. *Cf. United States v. Bottone*, 365 F.2d 389, 393 (2d Cir. 1966) ("To be sure, where no tangible objects were ever taken, a court would be hard pressed to conclude that 'goods' had been stolen and transported within the meaning of section 2314.") Accordingly, the Fifth Circuit correctly determined that these conceptual differences necessitated a finding that Section 2314 did not encompass copyrights. *United States v. Smith*, 686 F.2d at 240-41.

The Ninth Circuit in *Belmont*, and in Petitioner's case, 739 F.2d at 1450, rejected the reasoning of the Fifth Circuit in *United States v. Smith*,⁴ and implicitly concluded that Section 2314 included all personal property ordinarily subject to commerce. *See, e.g.*, 715 F.2d at 461 n.1.

³Because a copyright is separate and distinct from the tangible object in which the copyright is embodied, *United States v. Seagraves*, 265 F.2d 876 (3rd Cir. 1959) is distinguishable. There, the Third Circuit held that geographical maps were goods, wares, or merchandise within the meaning of 18 U.S.C. § 2314. Geographical maps consist of a drawing on paper, and the two items—the paper and the drawing—are inseparable. Unlike a copyright, a geographical drawing necessarily requires a physical embodiment for transfer. Transfer of that physical object, unlike transfer of the physical object in which a copyright exists, transfers all the rights to that property.

⁴The Eleventh Circuit has also rejected the result in *United States v. Smith*. *See, e.g., United States v. Drum*, 733 F.2d 1503 (11th Cir. 1984); *United States v. Gottesman*, 724 F.2d 1517 (11th Cir. 1984). The District of Columbia, in dictum, also suggested that prosecution of copyright infringement is proper under section 2314 *United States v. Whetzel*, 589 F.2d 707, 710 n. 10 (D.C. Cir. 1978).

Under the *Belmont* Court's interpretation, interference with another person's contract right or chose in action, could also be the subject of a Section 2314 conviction. Whatever the general understanding of the function of intangible rights, such as copyright, the terms "goods, wares and merchandise" are not, in common usage, often applied to characterize intangible property such as a copyright. Congress did not clearly state its intent otherwise when it enacted the National Stolen Property Act.

Petitioner recognizes that the different results reached by the Fifth and the Ninth Circuits suggests that the NSPA's application to copyright infringement is ambiguous. Although the Ninth Circuit's reading of the NSPA may be plausible, plausibility is a far cry from the clear or intended meaning of the statute. *United States v. Williams* dictates that, under these circumstances, the legislative history of the NSPA be examined to determine Congress' intent to proscribe copyright infringement by enacting the NSPA. Before engaging in this analysis, section 2314's reference to "stolen, converted, or taken by fraud" will be examined to determine if these terms are commonly applied to Copyright Infringement.

B(2)(b) Copyright Infringement is Not the Equivalent of Conversion, Stealing, or Taking by Fraud Within the Meaning of 18 U.S.C. §2314

Petitioner contends that because the nature of the ownership interest of one who holds a copyright is vastly different from one who owns tangible property, copyright infringement is not the equivalent of stealing, converting, or taking property by fraud as set forth in section 2314. Copyright infringement is a trespass into another's intangible incorporeal rights while 2314's reference to stealing, conversion and taking by fraud connotes a deprivation of tangible property.

The Copyright Act grants the holder of a copyright the exclusive right to use and to authorize the use of the work, including reproduction in qualified ways. *Sony*, ____ U.S. ____ at ____, 104 S.Ct. at 784 & n.13. Unlike the law governing tangible property, copyright protection has never accorded the copyright owner complete control for all possible uses of the work. *Id. Accord Fortnightly Corp. v. United Artists*, 392 U.S. 390 (1968). See also *20th Century Corporation v. Aiken*, 422 U.S. 151, 155 (1974) (an unlicensed use of a copyright that does not conflict with an exclusive right conferred by statute is not an infringement of the holders' rights; no license is required by the Act to sing a copyrighted lyric in the shower) (footnote omitted). cf.; *Durham Industries, Inc. v. Sony Corporation*, 630 F.2d 905 (2nd Cir. 1980) (purpose of the copyright statute is to protect original designs from copying, not to convey to proprietor any right to exclude others from the market).

Because of the nature of the ownership interest of one who holds copyright is vastly different from one who holds tangible property, a violation of the former is conceptually distinct from the stealing of tangible property. In *Sony*, the Supreme Court explained that a violation of the copyright holder's exclusive right — that is, an infringement of the copyright — is a *trespass* into the author's exclusive rights. 104 S.Ct. at 784.

Consequently, courts considering the question have rejected the notion that copyright infringement is tantamount to conversion.⁵ See, e.g., *Local Trade Marks, Inc. v. Price*, 170 F.2d 715, 718 (5th Cir. 1948); (copying of books was not a conversion of the books themselves, but at

⁵ Similarly, copyright infringement by the United States is not a taking for purposes of due process just compensation jurisprudence. *Porter v. United States*, 473 F.2d 1329, 1337 (5th Cir. 1973).

most was an invasion of plaintiff's common law copyright which is an intangible incorporeal right that exists separate and apart from the property in the paper on which it is written or the physical substance in which it is embodied); *King Brothers Production, Inc. v. RKO Teleradio Pictures, Inc.*, 208 F.Supp. 271, 277 (S.D.N.Y. 1962) (because literary property is intangible and incorporeal in nature, existing separate and apart from the physical form in which it was embodied, it cannot be the subject of an action for conversion in the strict sense of the word).

The analogy between stealing, converting, or taking by fraud and copyright infringement is simply not appropriate. In *Sony*, the Supreme Court noted that the use to which stolen property is put is "quite irrelevant in determining whether depriving its true owner of his present possessory interest in it is venial; because of the nature of the item and the true owner's interest in the physical possession of it, the law finds that taking objectionable, even if the thief does not use the item at all." ____ U.S. at ____, 104 S.Ct. at 793 n. 33. Theft of a particular item of personal property, the Court noted, "may have commercial significance, for the thief deprives the owner of his right to sell that particular item to any individual." *Id.*

In marked contrast, the use to which a copyright is put is relevant to determining whether an infringement has occurred. Copyright infringement arises solely if the use to which the copyrighted article is put violates one of the enumerated exclusive rights in Section 106 of the Copyright Act. *E.g.*, 17 U.S.C. § 106(1)-(5). Copyright protection "has never accorded the copyright owner complete control over all possible uses of his work." *Sony*, ____ U.S. ____, 104 S.Ct. at 784 (footnote omitted).⁶ Copyright infringe-

⁶See *e.g.*, 17 U.S.C. §§ 106 and 107 for uses which are not considered copyright infringement.

ment simply does not *deprive* the owner of property; rather, it is a trespass into the holder's exclusive rights. Consequently, it does not come within the meaning of Section 2314. *Cf. United States v. Carman*, 577 F.2d 556 (9th Cir. 1978).

In *Carman*, the Ninth Circuit refused to extend section 2314 to a fraudulent scheme which reduced another's wealth by placing money out of the reach of creditors. The Ninth Circuit held that fraudulent conduct which placed money out of the reach of creditors does not constitute stealing, conversion, or taking by fraud within the meaning of section 2314. The *Carman* Court further reasoned that the specificity of another criminal statute covering the conduct at issue therein strongly suggested that the restrictive interpretation of section 2314 "should not be expanded at the government's will beyond the connotation — depriving an owner of his rights and property — conveniently called to mind." 577 F.2d at 565 (citation omitted) (emphasis added). The Court refused to make criminal a form of commercial dishonesty because ambiguities in criminal statutes are resolved in a defendant's favor. *Id.*

Petitioner submits that his acts of copyright infringement are analogous to the conduct in question in *Carman*. Because Petitioner's acts of copyright infringement did not deprive the copyright owners of their rights, but rather, constituted a trespass of those rights, Petitioner's activities do not constitute acts of stealing, conversion, or taking by fraud, within the meaning of section 2314. *See, e.g., United States v. Turley*, 352 U.S. 407 (1957).

In *Turley*, the Supreme Court construed the meaning of the term "stolen", as set forth in the National Motor Vehicle Theft Act, 18 U.S.C. § 2313. In concluding the term stolen included felonious takings accomplished by

embezzlement, false pretenses and conversion, the Court looked to Black's Law Dictionary for the definition of "steal". 352 U.S. at 412 (citing Black's Law Dictionary (4 ed. 1951)). Black's Law Dictionary defines the term "steal" as a term that is:

"[C]ommonly used in indictments for larceny ('take, steal, and carry away'), and denotes the commission of theft that is, the felonious taking and carrying away of the personal property of another, and without right and without leave or consent of the owner, with intent to keep or make use wrongfully. . . . Or, it may denote the criminal taking of personal property either by larceny, embezzlement, or false pretenses. But in popular usage, stealing may include the unlawful appropriation of things which are not technically the subject of larceny, e.g., immovables."

Black's Law Dictionary at 1267 (5th Ed. 1979) (emphasis in original) (citations omitted.) See also *United States v. Long Cove Seafood, Inc.*, 58 F.2d 159 (2nd Cir. 1978) (not all illegal takings come within the purview of 18 U.S.C. §2314).

As noted by the Fifth Circuit in *United States v. Smith*, this definition contemplates a removal of something tangible. 686 F.2d at 242. Moreover, the definition contemplates that whatever is removed is actually owned or in someone's possession. *Id.* The definitions of conversion and taking are similar. Conversion is defined by Black's Law Dictionary as:

An authorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of another's rights.

Any unauthorized act which deprives an owner of his property permanently or for an indefinite time

Black's Law Dictionary at 303 (5th Ed. 1979)

To "take" is defined by Black's as "to lay hold of; to gain or receive possession; to seize; to deprive one of the use of possession of [something]; or to assume ownership." *Id.* at 1303. Black's also defines taking as described in the law of larceny: "To obtain or assume possession of a chattel unlawfully and without the owner's consent. . . ." *Id.*

These definitions demonstrate *why* the terms "stolen, converted, or taken by fraud" are *not* generally used to connote copyright infringement. These definitions all concern the deprivation of something tangible. Copyright infringement is simply not a deprivation of some tangible property. The instant indictment amply illustrates this fact.

Each of the counts charging Petitioner with a violation of the National Stolen Property Act allege that Petitioner "knowingly transported in interstate commerce phonorecords containing Elvis Presley's vocal performances of copyrighted musical compositions, knowing that the phonorecords were stolen, converted and taken by fraud, *in that they were manufactured and intended to be distributed to the public without the consent of the copyright proprietor . . .*" (Jt. App. at A6-7, A8)(emphasis added). Thus, the stealing, conversion, or taking by fraud, as alleged in the indictment, is the fact that Petitioner *distributed* the phonorecords without the consent of the copyright proprietors. This distribution, however, did not *deprive* the holders of their copyrights; rather it interfered with their exclusive rights to distribution.

Accordingly, *how* Petitioner initially acquired the physical object in which the copyrights to musical compositions

were embodied is irrelevant for purposes of the analysis here. Petitioner was not indicted for his acquisition of Presley recordings; rather, it was the use to which Petitioner put the copyrighted compositions that constituted the crime.⁷ Petitioner submits that the acts of copyright infringement at issue here — distribution of phonorecords containing copyrighted musical compositions — are not the equivalent of stealing, converting, or taking by fraud within the meaning of the National Stolen Property Act.

B (3) The Legislative History of the National Stolen Property Act Does Not Provide Clear Legislative Guidance That Congress Intended the National Stolen Property Act to Include Acts of Copyright Infringement

The National Stolen Property Act was an extension of the National Motor Vehicle Theft Act, 18 U.S.C.A. §2312, which was passed in response to the growing number of automobile thefts in the United States. *See, e.g., United States v. Smith*, 686 F.2d 234, 245 (5th Cir. 1982); *United States v. Long Cove Seafood, Inc.*, 582 F.2d 159, 163 (2nd Cir. 1978). In *United States v. Turley*, 352 U.S. 407 (1957), the Court explained that the National Motor Vehicle Theft Act was concerned with the stealing or theft of tangible chattels. The Court examined, at length, the legislative history of the Act. The House Report describes the intended reach of the statute in conventional terms — i.e., the removable of tangible

⁷The Fifth Circuit in *United States v. Belmont*, suggests that a difference exists between copyright infringement accomplished by taping broadcasts “off the air” and stealing an original copy. 686 F.2d at 241-242. Thus, the Fifth Circuit distinguished cases where it was proven that stolen originals were moved in interstate commerce. This distinction is irrelevant to the case at bar, because the act of stealing, conversion, or taking by fraud alleged in the indictment is the act of copyright infringement, not the acquisition of the physical object in which the copyright is embodied.

property from the owner’s possession. *Id.* at 414 n.13. The National Stolen Property Act has been similarly described. *See United States v. McClain*, 545 F.2d 988, 994-95 (5th Cir. 1977). The Act “was intended to aid the states, which, because of jurisdictional limitations, could not prosecute the receivers or thieves of stolen property after that property moved across state lines. *Id.*, citing *United States v. Sheridan*, 329 U.S. 379, 384 (1946). *See also* 78 Cong. Rec. 2947 (1934) (remarks of attorney general Homer Cummings) (criminals have made full use of the improved methods of transportation and communication and have taken advantage of the limited jurisdiction possessed by the State authorities in pursuing fugitive criminals). The NSPA has been characterized as being modeled after the NMVTA. *United States v. Sheridan*, 329 U.S. 379, 383 n.9.

The legislative history of the 1934 National Stolen Property Act simply fails to provide evidence that Congress was aware of the statute’s claimed scope to cover acts of criminal copyright infringements. Rather, it suggests that the Congress was concerned with tangible property that could be easily moved across state lines. Copyrights and copyright infringement are never mentioned in the legislative history of the National Stolen Property Act. As the Court in *United States v. Smith* noted, “there would be no need for Congress to utilize the commerce clause in order to gain jurisdiction over activities involving copyrights [since the Constitution] grants Congress jurisdiction over copyright activity, and Congress had been utilizing the authority for several years prior to the 1934 National Stolen Property Act. Copyright infringing activity was already federalized and controlled with specific legislation.” 686 F.2d at 248.

In 1976, when Congress passed the 1976 Copyright Act, no felony provisions were part of that Act, although

Congress had been requested to include felony punishment in its comprehensive revision of the copyright laws. Omnibus Copyright Revision: Hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, 94 Congress, 1st Sess. 716 (1975) (statement of Jack Valenti). Felony provisions were not enacted until 1982 — *after* the copyright infringement conduct at issue in the instant case. Thus, these amendments have no application to the conduct at issue here. Petitioner submits, however, that these Amendments demonstrate that Congress did not believe that the felony provisions of any law applied to copyright infringement prior to the enactment of the 1982 amendments.

The Court of Appeals for the Ninth Circuit in *Belmont* and in Petitioner's case, adopted a markedly different analysis of the 1982 amendments. The Ninth Circuit concluded that the 1982 amendments, which were enacted subsequent to the copyright infringement acts of Petitioner at issue here, evidenced Congress' intent that §2314 proscribed acts of copyright infringement. The Ninth Circuit reasoned that because the 1982 amendments were adopted "in addition to other law", and section 2314 is "other law," Petitioner's copyright infringement could be prosecuted under section 2314. *Belmont*, 715 F.2d 461; *Dowling*, 739 F.2d. The Ninth Circuit's conclusion is faulty for several reasons.

First, as noted earlier, the 1982 amendments were enacted subsequent to Petitioner's copyright infringing activity. Petitioner clearly could not be prosecuted under these amendments. Second, although section 2319, as amended, provides that its remedies are in addition to other law, the legislative history of section 2319 makes clear that this language was included to clarify "that the remedies contained in 17 U.S.C. §506(b) (relating to

forfeiture and destruction) and those contained in 17 U.S.C. §509 (relating to seizure and forfeiture) would continue to apply to criminal infringements of a copyright." S. Rep. No. 97-274, 97 Cong., 1st Sess. 2 (1981), reprinted in 4 U.S. Code Cong. & Ad. News 128 (1982). The necessity for the clarifying amendment was because the Act, as introduced, was "unclear [as to] whether the penalties in the bill were to supplement existing remedies, or whether they were intended to be exclusive." *Id.*

Third, the legislative history makes clear that both the Congress and the Department of Justice believed that the current copyright laws were too lenient to provide an effective deterrent to copyright infringement activity. The Senate Committee noted that:

"In testifying before this Committee, the Department of Justice made clear its view that the penalties under current laws are too lenient to provide an effective deterrent. The Department stated:

As compared to other theft and forgery statutes, penalties for copyright, piracy and counterfeiting are among the most lenient, while these schemes are among the most lucrative. . . .

* * *

The committee concurs with the view that the current penalties for the film and record piracy and counterfeiting are too lenient and, for that reason, recommends the passage of S. 691. This legislation should help to fight the recent increase in piracy and counterfeiting by substantially increasing the allowable penalties for those crimes.

* * *

The current penalty for criminal infringement of a copyright in works other than sound

recordings or motion pictures is a maximum of one year in prison and/or a fine of \$25,000. . . .

S. Rep. No. 97-274, 97 Cong., 1st Session 6, 10 (1981), reprinted in 4 U.S. Code Cong. and Ad. News, 132-33, 136 (1982) (emphasis added).

Thus, the amendments indeed do evidence Congress' belief that the then current law — that is, the law applicable to Petitioner's conduct — did not include felony provisions of other laws. If, as the Ninth Circuit concluded, *see, e.g.*, (Pet. Supp. App. at A9-10), Section 2314 proscribes copyright infringement, the Piracy and Counterfeiting Amendment Act of 1982 would have been unnecessary. As the Fifth Circuit noted in *United States v. Smith*:

"The necessity for these increased punishment provisions was Congress' apparent belief that no felony punishment provisions applied to copyright infringing activities, including the interstate trafficking of private works. . . .

* * *

This recent Congressional activity in the area of copyright infringement demonstrates Congress felt a significant need to provide more stringent punishment for various forms of infringement. The specific 1976 Copyright Act, although a comprehensive revision of copyright law, failed to provide the necessary punitive measures. Of course, the Piracy and Counterfeiting Amendment Act of 1982 would have been unnecessary if the NSPA section 2314 — which provides for \$10,000 fines and/or ten years of imprisonment — were available."

686 F.2d at 248-49.

The legislative history of the 1934 NSPA contains no reference to copyrights or criminal infringement. The legislative history of the 1982 Piracy and Counterfeiting Amendments Act, which was enacted as a new section of the stolen property chapter, demonstrates Congress' belief that felony provisions of other laws had no application to criminal infringement prior to enactment of the Amendments. The legislative history of the NSPA simply fails to provide clear legislative guidance that criminal infringement comes within its purview. Where, as here, both readings of § 2314 are plausible, and the legislative history of the NSPA fails to provide clear guidance, statutory language much more explicit than that utilized in the NSPA should be required before finding that Congress intended to proscribe copyright infringement in enacting the National Stolen Property Act. *Williams v. United States*, 458 U.S. 279, 290 (1982).

C. Assuming That A Broad Reading Of The NSPA Would Encompass Acts Of Copyright Infringement, Sound Principles Of Statutory Construction Dictate That The Specific Remedies Provided For In Section 506 Of The Copyright Act, 17 U.S.C. § 506 (1976) Be Chosen As The Appropriate Vehicle For Prosecution Of Criminal Copyright Infringement Activity

The law is settled that where a general statute might be construed to relate to the same subject as does a more specific statute, the specific statute should apply to the exclusion of the general. *United States v. Carman*, 577 F.2d 556, 565 (9th Cir. 1978); *Kniess v. United States*, 413 F.2d 752 (9th Cir. 1969). These cases stand for the proposition that where a defendant's conduct falls within the literal language of either of two statutes, one specific and one general, the government must prosecute such conduct under the specific statute. Here, the copyright

statute, 17 U.S.C. §506, specifically applies to acts of criminal copyright infringement. Thus, even if a broad reading of the NSPA renders it plausible that acts of copyright infringement are proscribed, the specific remedies set forth in 17 U.S.C. §506 (1976) for such conduct makes the Copyright Act the more appropriate vehicle for prosecution of criminal copyright infringement.

The second applicable principle is that when a choice is to be made between two readings of what conduct Congress has made a crime, Congress must be required to speak in a language that is clear and definite, before the Courts choose the harsher alternative. *Williams v. United States*, 452 U.S. 279, 290 (1982). This principle is founded on two well-established policies. The first is that “ ‘a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.’ (citation)” *United States v. Bass*, 404 U.S. at 348. The second principle is that because criminal punishment represents moral condemnation of the community, the legislature and not the courts should define criminal activity. *Id.* In the instant case, an interpretation of Section 2314 to encompass copyright infringements would impermissibly increase the criminal penalties for such conduct beyond that prescribed by Congress in the Copyright Act, 17 U.S.C. §506(a) and (b). At the time Petitioner committed the acts of copyright infringement, Congress had not yet increased the penalty for copyright infringement to include a felony provision.

It was not until May 24, 1982, that the President signed into law piracy and counterfeiting amendments of 1982, Pub. L. No. 97-180, 96 stat. 91, (codified at 18 U.S.C. §2319). The Ninth Circuit erred in inferring that these Amendments demonstrate that Congress intended the

NSPA to encompass criminal infringement activity prior to enactment of these Amendments. The application of these Amendments to buttress Petitioner's felony convictions under section 2314 is improper. “This policy embodies the ‘instinctive distaste against men languishing in prison unless the law maker has clearly said they should.’ (citation)” *United States v. Bass*, 404 U.S. at 348.

II CONCLUSION

For the reasons set forth in the instant brief, Petitioner respectfully requests this Court to reverse the decision of the Court of Appeals for the Ninth Circuit which affirmed Petitioner's convictions for interstate transportation of stolen property (Counts Two through Nine of the second superseding indictment) in violation of 18 U.S.C. §2314.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on February 28, 1985, I served the within *Brief for Petitioner and Joint Appendix* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, U.S. Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and 40 copies)

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Department of Justice
Washington, D.C. 20530
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I declare under penalty of perjury that the foregoing is true and correct. Executed on February 28, 1985, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)